

\*E-Filed: March 28, 2014\*

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

RICK WOODS, Individually and on Behalf  
of All Others Similarly Situated,

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

No. C11-01263-EJD (HRL)

**INTERIM ORDER ON DDJR #1 AND  
DDJR #2; ORDER DENYING  
MOTION FOR LEAVE TO  
SUPPLEMENT**

**[Re: Docket Nos. 129, 130, 131, 135, 138]**

Plaintiff Rick Woods, representing a putative class, sues defendant Google, Inc. ("Google") for breach of contract and violations of California's Unfair Competition Law ("UCL") related to Google's alleged failure to apply as represented the "Location Targeting" and "Smart Pricing" features of its online advertising program "AdWords." Through the program, Google displays the ads of Woods and others, and they in turn pay Google each time their ad is "clicked." The Location Targeting feature purportedly allows advertisers to limit the geographic area of the persons to whom their ads are displayed. The Smart Pricing Feature purportedly reduces the cost per click when data indicates that the click is less likely to create business for the advertiser. Woods' First Requests for Production ("RFP") primarily sought documents and information related to Location Targeting. His Second RFP focused on Smart Pricing, including documents from a prior litigation. In July 2013, Woods filed Discovery Dispute Joint Report ("DDJR") #1 challenging the adequacy of Google's responses to his RFPs, and DDJR #2 concerning the "Relevant Period" of Woods' Second RFP. Neither DDJR contained any input from Google. Accordingly, Google objected to the DDJRs on

1 procedural grounds, namely noncompliance with the undersigned's Standing Order re Civil  
2 Discovery Disputes ("Standing Order"). However, Google has not substantively responded to or  
3 provided its position on either dispute. Woods later filed a Motion for Leave to Supplement  
4 DDJR#1, which Google again opposed on procedural grounds.<sup>1</sup>

## 5 BACKGROUND

6 Woods' First and Second RFPs requested, among other things, "click data"<sup>2</sup> related to  
7 Location Targeting and Smart Pricing. In its responses to the RFPs, Google objected to the click  
8 data requests on numerous grounds but generally agreed to meet and confer regarding the scope of  
9 the requests. To effectively confer, Woods requested descriptions of the fields of data Google  
10 maintains related to its click data requests. Eventually, Google explained that it stores the relevant  
11 click data in "log files" and "database tables," and it provided lists of what it claimed to be all  
12 relevant fields of data contained therein. However, Woods asserts that other documents produced in  
13 discovery indicate that Google's descriptions are incomplete.

14 Woods' Second RFP also requested documents from an earlier litigation, *In re Google*  
15 *AdWords*, including all documents Google produced in the litigation related to Smart Pricing, all  
16 documents relied on by the expert who opined on Smart Pricing, and un-redacted copies of all court  
17 filings. Again, Google objected but agreed to meet and confer to narrow the scope of the requests.  
18 During conferences, however, Google asserted that the requested documents were irrelevant because  
19 the claims and theories of recovery were different. Nevertheless, Woods contends that there are  
20 certainly responsive documents in common.

21 At some point the parties agreed to limit the temporal scope of discovery for several of  
22 Woods' claims because Google removed from its website the alleged misrepresentations on which  
23 those claims were based. However, Woods asserts that his claims based on Smart Pricing allege  
24 ongoing wrongful activity that continues to the present. Accordingly, Woods' Second RFP defined  
25 the "Relevant Period" from April 1, 2004 to the present. In its response, Google objected to Woods'

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26 <sup>1</sup> While procedurally proper, the Court nevertheless denies the motion for leave to supplement for  
27 lack of good cause.

28 <sup>2</sup> As defined by the First RFP: "'Click Data' means the complete uniform resource locator (URL) of  
the originating website of the click, the actual price the AdWords Advertiser paid for the click, the  
geographic origin of the click, the Location Targeting setting in effect for the AdWords user at the  
time of the click, and any other data Defendant maintains or tracks concerning the click."

1 description of the Relevant Period as overbroad, unduly burdensome, and not reasonably calculated  
2 to lead to the discovery of admissible evidence, and it stated it would limit its responses to the time  
3 period of April 1, 2004 to April 9, 2013. However, Woods' asserts that in subsequent conferences,  
4 Google indicated that it would further limit the time period of its responses, its latest proposal being  
5 a cutoff of July 1, 2012.

6 In July 2013, lead counsel for both parties met in person for three and a half hours to discuss  
7 numerous discovery issues. According to Woods, he informed Google the following day that if he  
8 did not receive responses resolving the issues within five days, the parties would be at an impasse  
9 necessitating judicial intervention. Having received no response by the sixth day, Woods declared  
10 an impasse and requested that Google prepare its statement for inclusion in the DDJR. Woods  
11 rejected Google's demand to see his portion of the DDJR before Google would prepare its own, but  
12 he did repeatedly advise Google of the precise issues to be addressed. Nevertheless, Google never  
13 provided its statements for inclusion in the DDJR.

14 On the other side, Google explains that in the days following the in person meet and confer  
15 between lead counsel, the parties held several follow up discussions and resolved most of their  
16 discovery disputes. Despite this progress, Woods unilaterally declared impasse on the few  
17 remaining unresolved issues one week after the meet and confer. He also demanded that Google  
18 send him its portions of the DDJR by the morning of one week later to be combined for filing in  
19 the afternoon. Google objected that Woods' declaration of impasse was premature and its proposed  
20 filing procedures unfair. Google requested just 24 hours' notice of Woods' portion of the DDJR in  
21 order to meaningfully respond. However, Woods refused and, having never provided with Google  
22 with anything more than broad categories of requested relief, unilaterally filed the DDJR.

23 Woods' DDJR #1 requests an order compelling Google to produce, with a designation no  
24 greater than "Confidential – Attorney's Eyes Only": (1) descriptions of the log files Google  
25 maintains with respect to clicks and impressions; (2) identification and descriptions of the fields of  
26 data maintained within those log files; (3) data from such log files relating to six specific clicks (and  
27 related impressions) of Woods' ad referenced in ¶ 120 of the complaint, which alleged that the six  
28 clicks were by users outside of Woods' geographic target; (4) complete identification and

1 description of the database tables (and fields contained therein) Google maintains with respect to  
2 clicks and impressions. Additionally, Woods' seeks an order compelling Google to produce all  
3 documents responsive to its requests for production related to the *In re Google AdWords Litigation*.

4 In DDJR #2, Woods requests that the Court overrule Google's objections to the Relevant  
5 Period for his Smart Pricing requests and compel Google to produce responsive documents for the  
6 Relevant Period, which continues through the date of trial.

7 Google requests that the Court strike the DDJRs for noncompliance with the undersigned's  
8 Standing Order and order lead counsel to continue the meet and confer process. Moreover, any  
9 party seeking to file a DDJR in this matter should be required to provide its portion of the report at  
10 least 72 hours prior to filing.

## 11 DISCUSSION

### 12 A. Preparation and Filing of the DDJRs

13 Pursuant to the Standing Order, a DDJR has only a few basic components. First, a cover  
14 page with general information, relevant dates, a one sentence issue statement, and an attestation of  
15 compliance with the Standing Order. Next, it "should describe the dispute and the facts essential to  
16 understanding it. Then, in a format that allows ready comparison, it should give each party's  
17 position (with brief citation to important authority), and – finally – each party's final and 'most  
18 reasonable' proposal for how the court should decide." It further provides that "[u]njustified delay  
19 or refusal to participate meaningfully in the preparation of the Joint Report is grounds for imposition  
20 of sanctions or entry of an order sought by the other side."

21 Google's main contention is that by refusing to share his draft DDJR statements, Woods  
22 failed to participate meaningfully in the preparation of the Joint Reports in violation of the Standing  
23 Order. However, while the Court would encourage the practice, nothing in the Standing Order  
24 mandates that either party share drafts of their individual portions, nor is it a prerequisite for  
25 meaningful participation. If lead counsel meaningfully meet and confer as contemplated by the  
26 Standing Order, then each side should be fully apprised of the discovery dispute at issue. While  
27 failing to exchange statements may prevent the parties from responding to very specific points or  
28 countering citations to authority, it should not prevent them from providing a statement of their

1 position and most reasonable proposal for how the court should decide, as the Standing Order  
2 requires. Thus, while Google complains that Woods failed to “meaningfully” participate, Google in  
3 fact failed to participate at all. At a minimum, it could have prepared for inclusion in the DDJR a  
4 statement of its general position along with its objection that Woods “refused to meaningfully  
5 participate.” Instead, it waited five days to object to the DDJRs and never provided a substantive  
6 response. Accordingly, the Court does not find that Woods’ failed to comply with the Standing  
7 Order and will not strike the DDJRs on that ground.

8 B. Discovery Dispute Joint Report #1

9 The first issue of DDJR #1 is whether Google must produce descriptions of the data  
10 responsive to Woods’ click data requests so as to allow the parties to meaningfully meet and confer  
11 as to the proper scope of Google’s ultimate production. Additionally, Woods requests production of  
12 some data for six specific clicks his complaint alleges were by persons outside his geographic target  
13 but that Google reported were within it. Woods represents that on the eve of the filing of the DDJR,  
14 Google offered to make available for inspection the requested descriptions of data; however, he  
15 declined because Google did not provide a date for production, and the deal was conditioned on the  
16 information being tagged with the highly restrictive “Source Code” designation.

17 Woods’ request for descriptions of the fields of data Google maintains and very limited  
18 production of specific click data, as opposed to a blanket request for an order compelling production  
19 of all responsive documents and information, seems entirely reasonable. Accordingly, within  
20 fourteen (14) days from the date of this order, Google shall produce: (1) descriptions of the log files  
21 and database tables Google maintains with respect to clicks and impressions,<sup>3</sup> including the fields of  
22 data contained in the log files and database tables; and (2) data from log files relating to the clicks  
23 (and related impressions) alleged in ¶ 120 of the complaint. As for the level of protection the data  
24 deserves, as the producing party, Google shall designate this information as is appropriate pursuant  
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26 <sup>3</sup> Woods requests data related to “impressions” without ever defining the term or discussing its  
27 relevance. However, it is the Court’s understanding that an “impression” refers to an ad being  
28 displayed, although not necessarily “clicked.” Here, Woods has only demonstrated the relevance of  
clicks, and thus, as far as the Court is now concerned, the only relevant impressions are those  
actually lead to clicks. Accordingly, to the extent that Google maintains log files and/or database  
tables differently for impressions that lead to clicks as opposed to impressions generally, Google  
only need produce descriptions of the former.

1 to the operative Stipulated Protective Order. Then, upon inspection, Woods may challenge the  
2 designation according to the procedures prescribed by the Stipulated Protective Order and the  
3 undersigned's Standing Order. However, a preemptive determination of the proper designation is  
4 inappropriate.

5 As for the second issue of DDJR #1, the Court agrees with Woods that there are certainly  
6 responsive documents in common between the instant case and *In re Google AdWords Litigation*,  
7 and that the different underlying bases for recovery are not grounds for a wholesale refusal to  
8 produce responsive documents. However, here Woods does request a blanket order compelling all  
9 documents responsive to three requests in its Second RFPs (Nos. 31-33), which does not seem  
10 entirely reasonable. It is not clear that the categories of documents requested are sufficiently narrow  
11 and that Google's objections in its responses are without merit. Thus, the Court is unwilling to grant  
12 Woods his requested relief, and unfortunately, no lesser relief in his favor is apparent on the record  
13 before the Court. Accordingly, the parties are ordered to meet and confer and, if necessary file a  
14 Joint Supplement to DDJR #1 per the instructions below.

15 C. Discovery Dispute Joint Report #2

16 Woods asks the Court to overrule Google's general objections that Woods' description of the  
17 Relevant Period is "overbroad as to time, unduly burdensome and not reasonably calculated to lead  
18 to the discovery of admissible evidence." Moreover, Woods asks the Court to hold that the duty to  
19 supplement per Rule 26(e) continues beyond the fact discovery cutoff date. And finally, due to  
20 ongoing duty to supplement, the Relevant Period necessarily includes up to the date of trial.

21 The Court can definitively state that the Rule 26(e) duty to supplement or correct incomplete  
22 or incorrect responses does, in fact, extend beyond the discovery cutoff date. This is evidenced by  
23 the Advisory Committee Notes to the 1993 Amendments, which provide that supplementations  
24 "should be made at appropriate intervals during the discovery period, and with special promptness  
25 as the trial date approaches," as well as recent case law. *See F.T.C. v. AMG Services, Inc.*, No. 2:12-  
26 cv-00536-GMN-VCF, 2014 WL 317781, at \*6 (D. Nev. Jan. 28, 2014) ("The duty to supplement  
27 extends to . . . the period after the close of discovery.") (citing *Star Direct Telecom, Inc. v. Global*  
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However, the Court is not convinced that Google's objections are without merit and that Woods is entitled to discovery of new information leading all the way up to the date of trial, as several factors not discussed by Woods in the DDJR may affect the Relevant Period. For example, although Woods purports to represent a class that is suffering an ongoing harm, Woods himself stopped advertising with Google in 2011. The Relevant Period may change depending how that class, if certified, is ultimately defined. Even simple practical considerations, such as convenience to the parties and the court, might necessitate limiting the Relevant Period. Thus, the Court does not have enough information to fairly overrule Google's objections (although its attempts to further limit the Relevant Period beyond what it initially objected to is suspect), and it is too early to impose on Google an ongoing duty to produce newly developed information up to the date of an as of yet unscheduled trial. Accordingly, the parties are ordered to further meet and confer on this issue, and if necessary, file a Joint Supplement to DDJR #2.


## CONCLUSION

With respect to the first issue of DDJR #1, Google shall produce the requested information within fourteen (14) days as discussed above. As for Google's production of *In re Google AdWords Litigation* documents (second issue of DDJR #1) and the Relevant Period for Woods' Smart Pricing claims (DDJR #2), lead counsel for each party shall meet and confer in person within 14 days from the date of this order. If the meet and confer fails to resolve these remaining issues, then the parties shall file Joint Supplement to DDJR #1 and/or Joint Supplement to DDJR #2 within five (5) business days of the meet and confer. Additionally, although not generally required by the Standing Order, due to the parties' previous inability to cooperate and in order to facilitate the resolution of these long-standing disputes, the parties shall exchange drafts of their individual portions of the Joint Supplements, including their position statement and most reasonable proposal, within three (3) business days of the meet and confer. Thereafter, it is up to the parties to determine how revisions may be made and combined into a finished product to be timely filed.

**IT IS SO ORDERED.**

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Dated: March 28, 2014



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HOWARD R. LLOYD  
UNITED STATES MAGISTRATE JUDGE



**C11-01263 Notice will be electronically mailed to:**

Andrew Gordon Pate drewpate@nixlawfirm.com

Brad Edward Seidel bseidel@npraustin.com, monatucker@nixlawfirm.com

Edward D. Johnson wjohnson@mayerbrown.com, msamora@mayerbrown.com,  
pdocket@mayerbrown.com, rbarreras@mayerbrown.com

Eric Evans eevans@mayerbrown.com, cpohorski@mayerbrown.com

Erik David Peterson epeterson@ktmc.com, arobles@ktmc.com

Jeffrey John Angelovich jangelovich@npraustin.com, bethgoodman@nixlawfirm.com

Jonathan Anderson Helfgott jhelfgott@mayerbrown.com

Joseph H. Meltzer jmeltzer@ktmc.com, eciolko@ktmc.com, jbelack@ktmc.com,  
kmarrone@ktmc.com, lloper@ktmc.com, pleadings@ktmc.com

Naumon A Amjed namjed@ktmc.com

Peter H LeVan , Jr plevan@ktmc.com

Ramzi Abadou rabadou@ktmc.com, arobles@ktmc.com, knguyen@ktmc.com

Robin Winchester rwinchester@ktmc.com, ckeller@ktmc.com, jwilliams@ktmc.com

Ryan Thomas Degnan rdegnan@ktmc.com

Sean M. Handler , Esq ecf\_filings@ktmc.com, dcheck@ktmc.com, namjed@ktmc.com

Stacey Marie Kaplan skaplan@ktmc.com

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